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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1338~~

ROBERT APODACA, *et al.*,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF FOR PETITIONERS

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Smith v. Texas, 311 U.S. 128 (1940) 17
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United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969) . 10, 13, 15
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Annals of Congress (1834) 22

Blackstone, Commentaries On the Laws of England (1765) 8, 10

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I J. Chitty, A Practical Treatise on the Criminal Law (1816) . . . 8

Note, Community Hostility and the Right to an Impartial Jury, 60 Colum. L. Rev. 349 (1960) 18

J. Elliot, Debates In the Several State Conventions on the Adoption of the Federal Constitution, and Journal of the Federal Convention (2nd ed. 1936) 21, 22

The Federalist Papers, No. 83 23

M. Ferrand, Records of the Federal Convention of 1787 (1911) 23

W. Forsyth, History of Trial by Jury (2d ed. Morgan (1875)) 9, 11

Sir Matthew Hale, The History of the Common Law of England (1713) 8, 18

Sir Matthew Hale, Historia Placitorium Coronae (1736) 8

Kalven & Zeisel, The American Jury: Notes For an English Controversy, 48 Chi. Bar Rec. 195 (1967) 11, 15, 18

Kalven & Zeisel, The American Jury (1966) 11, 12, 15

Kaplan, Decision Theory and the Fact Finding Process, 20 Stan. L. Rev. 1065 (1968) 13

Kuhn, Jury Discrimination: The Next Phase, 41 S. Cal. L. Rev. 235 (1968) 18

von Moschzisker, Trial by Jury (1930) 17

Note, On Instructing Deadlocked Juries, 78 Yale L. J. 100 (1968) 15, 20

J. Proffatt, A Treatise on Trial by Jury (1876) 13, 16

R. Pound and T. F. Plucknett, Readings On the History and System of the Common Law (1927) 8

Comment, "Should Jury Verdicts Be Unanimous in Criminal Cases," 47 Ore. L. Rev. 417 (1968) 11

J. F. Stephen, A General View of the Criminal Law of England (1863) 11, 15

J. Story, Commentaries On the Constitution of the United States (1833) 8, 10

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Note, The Jury: A Reflection of the Prejudices of the Community, 20 Hastings L. J. 1417 (1969) 18

Tucker, Racial Discrimination in Jury Selection in Virginia, 52 Va. L. Rev. 736 (1966) 18

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 5338

ROBERT APODACA, *et al.*,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF FOR PETITIONERS

I. OPINIONS BELOW

The decision of the Court of Appeals of the State of Oregon in these cases is reported at 89 Ore. Adv. Sh. 939, 462 P.2d 691 (1969), and appears in the printed appendix at pages 8, 14 and 21. There were no opinions in these cases in the Supreme Court of Oregon. (See App. 9, 15, 22). The Supreme Court of Oregon decided the question involved in this case adversely to the contention of petitioners herein in *State v. Gann*, 89 Ore. Adv. Sh. 853, 463 P.2d 570 (1969).

II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The petitioners in each of these cases were convicted of felonies in Circuit Courts of the State of Oregon. In each case, less than unanimous jury verdicts were rendered in accordance with Article I, Section 11 of the Oregon Constitution. In each case, the contention of the petitioner that the Sixth and Fourteenth Amendment to the United States Constitution prohibited a conviction by a divided vote of the jury was rejected on the merits by the Court of Appeals of the State of Oregon (App. 8, 14 and 21), and, in each case, review was denied by the Supreme Court of Oregon (App. 9, 15, 22). The jurisdiction of this Court over this cause is conferred by 28 U.S.C. § 1257(3).

The decisions of the Supreme Court of Oregon declining to review these cases were rendered on March 10, 1970. A motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari were filed in this Court on June 5, 1970. Both the motion and the petition were granted on November 9, 1970.

III. THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the Oregon Constitution.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and causes of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 11 of the Constitution of Oregon provides:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

IV. THE QUESTION PRESENTED

Does the Sixth Amendment right to trial by jury, as applied to the states by the Fourteenth Amendment, guarantee unanimity in jury verdicts?

V. STATEMENT OF THE CASE

The three petitioners herein, Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden, were separately convicted of the crimes of assault with a deadly weapon (Ore. Rev. Stat. 163.250), burglary in a dwelling (Ore. Rev. Stat. 164.230), and grand larcency (Ore. Rev. Stat. 164.310), respectively, in Circuit Courts in the State of Oregon. Upon conviction, Apodaca was sentenced to a term of imprisonment up to five years, Cooper up to three and a half years and Madden up to three years. The trial in each case occurred after May 20, 1968, the date of this Court's decision in *Duncan v. Louisiana.*[1] Under the provisions of Article 1, Section 11 of the Oregon Constitution, a jury verdict in cases tried in Circuit Court, other than verdicts of guilty of murder in the first degree, may be rendered by ten members of the twelve-man jury. In the Cooper case, ten members of the jury rendered the verdict, with two jurors in disagreement (App. 11-12). In the Apodaca and Madden cases, verdicts were rendered by eleven jurors, with one juror not concurring (App. 5, 18).

In a consolidated opinion, the Court of Appeals of the State of Oregon rejected petitioners' claims that, by virtue of the provisions of the Sixth and Fourteenth Amendments to the United States Constitution, they could be convicted only upon unanimous jury verdicts (App. 8, 14, 21). In its brief opinion, the Court of Appeals simply followed the recent decision of this issue by a closely divided vote of the Supreme Court of Oregon in *State v. Gann,* 89 Ore. Adv. Sh. 853, 463 P.2d 570 (1969). In each of these cases, review was denied by the Supreme Court of Oregon on March 10, 1970 (App. 9, 15, 22). The sole question pre-

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[1] 391 U.S. 145 (1968). The cases were tried on October 11, 1968, November 14, 1968 and December 10, 1968, respectively. (App. 1-2). In *De Stefano v. Woods,* 392 U.S. 631 (1968), the Court held that the right to jury trial would not be enforced against the states in cases tried prior to the date of the ruling in *Duncan.*

sented for review is whether the Sixth Amendment right to trial by jury, which this Court has held fully applicable to criminal proceedings in state courts, guarantees the right to unanimous jury verdicts.

VI. SUMMARY OF ARGUMENT

The requirement of unanimity is an indispensable ingredient of the trial by jury guaranteed in criminal cases by the Sixth and Fourteenth Amendments. Where the unanimity requirement is abandoned, the nature of trial by jury is drastically altered and the protection afforded a criminal defendant substantially weakened. Specifically,

—Full deliberation by the jury in an effort to reach a common decision is a fundamental characteristic of the jury process, affording an important protection to defendants in criminal cases. Deliberation tends to insure that the jury has considered the views of each of its members; it operates to test the opinions of each juror and to correct any erroneous understanding of the evidence. Where the unanimity requirement is abandoned, jury deliberation ends prematurely when the requisite majority for a verdict is reached. When that majority exists at the outset, there is no deliberation or consideration of dissenting views.

—Jury unanimity is a self-operating mechanism which enforces the due process requirement that guilt be proven beyond a reasonable doubt. It reflects the historic Anglo-Saxon tradition that it is preferable to acquit the guilty than to convict the innocent.

—The unanimity rule furthers the policy that jury panels represent a fair cross-section of the community, by assuring that divergent views and backgrounds are represented in the deliberation and the verdict. In this way it legitimates the imposition of criminal sanctions in the eyes of the community.

These considerations provide the element missing in *Williams v. Florida.*[2] Unlike the requirement of 12, jury unanimity rests on more than "mystical or superstitious insights"; it is closely related "to the great purposes which gave rise to the jury in the first place."[3]

In other respects, there is a far stronger case for interpreting the Sixth Amendment to require unanimity than there was in *Williams* to require 12 jurors. There is substantial historical evidence of the intention of the framers that the unanimity requirement be secured by the Sixth Amendment. Moreover, there is widespread national adherence to the unanimity requirement. Only two states, Oregon and Louisiana, provide for less than unanimous jury verdicts in serious criminal cases; two others provide for non-unanimous jury verdicts in a group of cases punishable by up to one year in prison. By contrast, at least 12 states provide for juries of less than 12.[4] Both because of the lesser number of jurisdictions involved and because of the greater ease of complying with a unanimity requirement than with a requirement of 12, the practical difficulties of implementing compliance, which troubled the Court in *Williams*, are not a significant factor here. Especially in the absence of substantial practical problems, retention of the unanimity requirement is far preferable to a decision that will necessarily create uncertainty concerning the validity of different state practices involving various combinations of jury and majority size.

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[2] 399 U.S. 78 (1970).

[3] 399 U.S. at 88, 89-90.

[4] See note 45, *infra*, and accompanying text.

VII. ARGUMENT

THE SIXTH AMENDMENT GUARANTEES UNANIMITY IN JURY VERDICTS.

In *Williams v. Florida, supra,* the Court held that the Sixth Amendment does not guarantee a jury of 12 in criminal cases.[5] The Court noted that a jury of 12 was firmly established at common law[6] and had been repeatedly recognized as an element of the Sixth Amendment right,[7] but upon reconsideration of the question held that only those characteristics of the common law jury that have a strong functional relationship to the historic purposes of jury trial are secured by the Sixth Amendment.[8] The twelve-man requirement was found not to meet this test.

This case involves an issue expressly left open in *Williams* –whether the Sixth Amendment guarantees unanimity in the jury verdict.[9] The requirement of unanimity, like the requirement of 12 jurors, is firmly rooted in common law

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[5]The Court held in *Duncan v. Louisiana,* 391 U.S. 145 (1968), and reaffirmed in *Baldwin v. New York,* 399 U.S. 66 (1970), that the Sixth Amendment jury trial right is fully applicable in state criminal cases, by virtue of the Fourteenth Amendment.

[6]399 U.S. at 86-90.

[7]*Id.* at 90-92.

[8]*Id.* at 99-100.

[9]*Id.* at 100, n. 46. See also *Duncan v. Louisiana, supra,* 391 U.S. at 158, n. 30.

history[10] and in the decisions of this Court.[11] But unlike a jury of 12, unanimity is essential to achieving the purposes of the jury in criminal cases. Moreover, there are additional strong considerations that were not present in *Williams* which favor the retention of the unanimity requirement. There is strong support for the conclusion that the framers of the Bill of Rights intended to incorporate the unanimity requirement in the Sixth Amendment jury trial guarantee. Further, there is close to universal adherence in the American states to the unanimity requirement in jury trials. Lastly, practical considerations favor the retention of the unanimity requirement.

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[10] In *Anonymous Case*, 41 *Lib. Assisarum* 11 (1367), the justices of assize decided that they could not accept an 11 to 1 guilty verdict, where the twelfth juror refused to agree to the defendant's guilt, saying that he would rather die in prison first. This case has been widely cited in treatises on the common law, and has been reprinted in English in R. Pound and T. F. Plucknett, *Readings On the History and System of the Common Law* (1927) (translated by Thayer) at 155-56.

The authors of the common law treatises all recognized the requirement of unanimity. See Sir Matthew Hale, *The History of the Common Law of England* (1713) at 261 and 263; 2 Sir Matthew Hale, *Historia Placitorum Coronae* (1736) at 297 and 309; 3 Blackstone, *Commentaries On the Laws of England* (1765) at 375-76 and 4 *Commentaries* at 349 and 360; 1 J. Chitty, *A Practical Treatise on the Criminal Law* (1816) at 635-36; 3 J. Story, *Commentaries on the Constitution of the United States* (1833) at 652.

[11] See *Andres v. United States*, 333 U.S. 740 (1948); *Thompson v. Utah*, 170 U.S. 343 (1898) (dictum); *Patton v. United States*, 281 U.S. 276, 288 (1930) (dictum); *cf. American Publ. Co. v. Fisher*, 166 U.S. 464, 468 (1897) (unanimity in civil juries secured by the Seventh Amendment); *Springville v. Thomas*, 166 U.S. 707 (1897) (same).

A. Unanimity Performs Indispensable Functions In Terms of the Historic Purposes of the Criminal Jury.

In several respects relaxation of the rule of unanimity drastically alters the nature of trial by jury and weakens the protection the jury has historically afforded a criminal defendant.

1. *The Unanimity Requirement Assures Full and Complete Jury Deliberation.*

The historic role of the jury in Anglo-American criminal law is to hear the evidence, receive instructions on the law, and deliberate collectively in an effort to reach a common decision. "The very object of the jury system is to secure unaninity by a comparison of views and by arguments among jurors themselves." *Allen v. United States,* 164 U.S. 492, 501 (1896). While trial by jury entrusts to a group of laymen grave decisions affecting life and liberty, the integrity of their decisional process has been assured by requiring that the views of each juror be examined and tested by the other jurors in the give and take of the deliberative process:

> One advantage resulting from the rule [of unanimity] no doubt is that if any one juror dissents from the rest, his opinion and reasons must be heard and considered by them. They can not treat these with contempt or indifference, for he has an absolute veto upon their verdict, and they must convince him or yield themselves, unless they are prepared to be discharged without delivering any verdict at all. This furnishes a safeguard against precipitancy and insures a full and adequate discussion of every question which can fairly admit of doubt.

W. Forsyth, *History of Trial by Jury* 204 (2d Ed. Morgan 875).

> The importance of this comparison and discussion is particularly great in the case of untrained

> judges . . . . [T]he verdict ultimately represents general impressions founded on conclusions, of which many are forgotten in the course of the trial; and though the value of such general impressions is often underrated, there can be no doubt that their importance depends, if not principally, at least to a great extent, on their being checked by and compared and found to correspond with, the general impressions of others.

J. F. Stephen, *A General View of the Criminal Law of England* 221 (1863). See also *United States v. Fioravanti*, 412 F.2d 407, 417-18 (3d Cir. 1969).

Jury deliberation, as encouraged by unanimity, operates to offset appeals to passion and prejudice by providing a safeguard against hasty verdicts[12] based on emotion rather than evidence.[13] The unanimity rule thus protects against oppressive prosecutions based upon popular prejudice—one of the great purposes behind the guarantee of jury trial in the Sixth Amendment. See *Duncan v. Louisiana, supra*, 391 U.S. at 155.[14]

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[12] Justice Goodwin, dissenting in *State v. Gann*, 83 Ore. Adv. Sh. 853, 462 P.2d 570 (1969), reproduced in Appendix B to the petitions for certiorari herein, stated that the unanimity rule:

> undoubtedly decreases the likelihood of precipitancy and increases the opportunity for a full and adequate discussion of every issue about which there is reasonable doubt.

Appendix B at 32.

[13] This danger is particularly acute because of the nature of the jury as a body of completely untrained factfinders. Although a large measure of the value of jury trial lies in just this fact, see 3 J. Story, *Commentaries On the Constitution* (1833) at 653; 4 Blackstone, *Commentaries* at 349, it creates a danger in that untrained laymen are far more susceptible to appeals to passion and to prejudice than are judges. See *Marshall v. United States*, 360 U.S. 310 (1959); *Turner v. State of Louisiana*, 379 U.S. 466 (1965).

[14] In 1833, for example, Justice Story warned of the difficulty of ensuring that innocent persons are not unjustly convicted by juries when there is "a spirit of violence and vindictiveness on the part of

When a majority can render a verdict, the process of deliberation is undercut in two respects. First, if the requisite number of jurors agree at the outset, there will be no deliberation at all. In these cases, the minority jurors, who may be the most capable and intelligent members of the jury and who may remember a point of evidence that would have been convincing to the majority, will never be heard. See Comment, *Should Jury Verdicts be Unanimous in Criminal Cases,* 47 Ore. L. Rev. 417, 424 (1968).

Second, even when a requisite number of jurors do not agree at the outset and some deliberation is required, that process is prematurely cut off once the necessary majority agrees on a verdict. In at least 25% of the criminal cases in Oregon, split verdicts are rendered.[15] The very fact that there are dissenting jurors in these cases who feel strongly enough to report their disagreement indicates that these are the cases in which there is serious question as to the guilt or innocence of the accused.[16] But notwithstanding the special need for careful consideration of the evidence in just such cases, when ten jurors agree deliberation stops and the verdict is rendered.[17] The value of deliberation to the point of a consensus, with the attendant possibility that the majority may be swung over in the continuing examination, is lost.

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the people [who] . . . may demand their victim with a clamorous precipitancy." 3 *Commentaries on the Constitution* at 653. Similarly, J. F. Stephen, in his study of the English criminal process, stated, *inter alia,* that he thought "popular prejudice" in the jury room could influence a large majority of the jurors. J.F. Stephen, *A General View of the Criminal Law of England* (1863) at 222.

[15]Kalven & Zeisel, *The American Jury: Notes For an English Controversy,* 48 Chi. Bar Rec. 195, 201 (1967).

[16]W. Forsyth, *History of Trial by Jury, supra,* at 204-205, 210.

[17]Kalven & Zeisel, *The American Jury: Notes For an English Controversy,* 48 Chi. Bar Rec. 195, 201 (1967).

In jurisdictions in which the unanimity requirement prevails, the jury deadlocks in only 5.6% of the cases.[18] Thus, it is plain that Oregon juries render divided verdicts in a large number of cases in which a unanimous verdict could be reached after further deliberation. In some of these cases, the minority might have convinced the majority of the correctness of its views. In others, a middle ground would have been agreed upon, involving a conviction of a lesser included offense or of less than all the counts charged. But even where full deliberation would have resulted in the same verdict, the completion of the process would have provided an important safeguard against an erroneous decision.

2. *The Unanimity Requirement Serves to Assure a Higher Standard of Proof in Criminal Cases.*

As the Court suggested in *Williams,*[19] the unanimity requirement helps insure that the government bear a heavier burden of proof in criminal cases and thus protects against the conviction of innocent persons.

The Court has held that due process of law prohibits criminal convictions except upon proof of guilt beyond a reasonable doubt.

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

In re Winship, 397 U.S. 358, 363-64 (1970).

The unanimity requirement assures that this standard of guilt is actually applied.

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[18] *Id.* at 200 Kalven & Zeisel, *The American Jury,* 453, 461 (1966).

[19] 399 U.S. at 100 n. 46.

> The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms.

Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953). *Accord: United States v. Fioravanti,* 412 F.2d 407, 418-19 (3d Cir. 1969); *Billeci v. United States,* 184 F.2d 394, 403 (D. C. Cir. 1950).[20]

In another respect, the unanimity requirement serves to enforce the standards of guilt in criminal cases. Jurors are laymen unschooled in the law. Verbal distinctions between guilt beyond a reasonable doubt and guilt by a preponderance of the evidence frequently become blurred and some jurors will vote to convict if they believe the evidence of guilt outweighs the evidence of innocence.[21] By contrast, the unanimity requirement is a self-operating mechanism which gives substance to the standard of guilt beyond a reasonable doubt.[22] Even if some individual jurors actually apply a standard less rigorous than that instructed by the

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[20]It is a safe and most valuable principle of criminal law that before a person should be convicted of an offense; and deprived of the most sacred rights a man can enjoy, life and liberty, there should be proof of his guilt beyond all reasonable doubt, and if, when the facts and evidence are placed before twleve men who, we must presume, are conscientious, a single one of them has a doubt of the person's guilt, this ought to be sufficient to prevent a conviction. Proffatt, *A Treatise on Trial by Jury* 117 (1876).

[21]*Cf. In re Winship, supra,* 397 U.S. at 369-70 (Harlan J., Concurring); Kaplan, *Decision Theory and the Fact-Finding Process,* 20 Stan. L. Rev. 1065, 1071-77 (1968).

[22]*Cf. In re Winship, supra,* at 363.

> The reasonable-doubt standard . . . provides concrete substance for the presumption of innocence . . . .

Court, where all the jurors are required to reach the same conclusion, a stringent standard—whether or not it can be precisely categorized as guilt beyond a reasonable doubt—has nevertheless been met.

In *Williams*, the Court considered whether the reduction of the number of jurors from 12 to 6 reduced the government's burden of proof in criminal cases:

> What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries. In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members.[23]

By contrast, both evidence and theory make plain that the unanimity requirement is more advantageous to a criminal defendant than a rule permitting less than unanimous verdicts, and that the unanimity rule provides an important protection against erroneous criminal verdicts.[24]

It is obvious that it is harder to convince all of the jurors than some of the jurors that a defendant is guilty beyond all reasonable doubt. Where there are dissenters on a given record, more and better proof would have convinced them. To accept a verdict over their dissent in these cases reduces the applicable standard of proof.[25]

By contrast with the 5.6% figure of hung juries in unanimous verdict jurisdictions, where unanimity is not required

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[23] 399 U.S. at 101-02.

[24] See the dissenting opinion of Justice Goodwin in *State v. Gann, supra,* Appendix B to the Petition for Certiorari herein at 32.

[25] Justice Goodwin reached the same conclusion in his dissent in *State v. Gann, supra,* Appendix B at 33:

> Thus, because it requires the concurrence of the unimpassioned and the unprejudiced, the protection of unanimity increases the likelihood that the guilt of the accused will truly be established beyond a reasonable doubt.

3.1% of the criminal juries fail to reach verdicts.[26] Thus, in 2½% of the criminal trials in Oregon, a split verdict is rendered, although the jury would have hung under the common law standard. These are cases in which a verdict is rendered, but in which further deliberation would not have brought the dissenting jurors to vote with the majority. Recent evidence indicates that one or two jurors will indefinitely resist the powerful verbal and psychological pressures toward concurrence in the view of the majority only where there were other jurors in support of their position at the outset of deliberation.[27] In these situations, where the convictions of one or two dissenting jurors were originally supported by others and are so deep-rooted that the pressures toward unanimity arising out of prolonged deliberation are resisted, it is the historic judgment that guilt beyond a reasonable doubt has not been established and that the case not be decided.

> The most likely explanation for the 10:2 or 11:1 deadlocked juries is that it is a response to genuine difficulties in the case. . . ."[28]

"The possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty." *United States v. Fioravanti, supra,* 412 F.2d at 416. "[F]ailure to agree . . . is, at least momentarily, a victory for the defense and a legitimate end of the trial." *Hoffman v. United States,* 297 F.2d 754, 758 (5th Cir. 1962) (Brown, J., dissenting).

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[26]Kalven & Zeisel, *The American Jury* 461 (1966).

[27]*Id.* at 462; Note, On Instructing Deadlocked Juries, 78 Yale L. J. 100, 107-113 (1968).

[28]Kalven & Zeisel, *The American Jury: Notes For An English Controversy,* 48 Chi. Bar Rec. 195, 201 (1967). See Note, *On Instructing Deadlocked Juries,* 78 Yale L. J. 100, 129 (1968). See also J. F. Stephen, *supra,* at 222:

> A minority which retains its opinion after . . . deliberation is not much less likely to be right than a majority.

Because it allows convictions in situations in which the jury would otherwise deadlock, a lessening of the unanimity requirement results in an unmistakable lessening of the burden of proof. And given the care with which our legal system attempts to avoid the possibility of convicting the innocent[29] two or three cases in a hundred is a very substantial number in which to incur a substantial additional risk of erroneous convictions.[30]

In maintaining a very high standard of proof in criminal cases, the unanimity requirement assures the community that innocent men are rarely convicted of crimes.[31] This assurance will erode if, in one case after another, a judgment of a conviction is entered where one or more jurors are convinced of the innocence of the accused.

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[29] See *In re Winship, supra,* 397 U.S. at 363-64. In 1736, Sir Matthew Hale stated:

> . . . [T]he best rule is *in dubiis* rather to incline to acquittal than conviction.

1 *Historia Placitorum Coronae* at 509. See also *id.*, at 300. See also J. Proffatt, *supra,* at 117.

[30] In *Williams,* the Court pointed out that a lessening of historic standards for the jury process may make acquittals easier to obtain as well as convictions. 399 U.S. at 101. But a case in which the jury is divided 10-2 in favor of the accused is in practical terms virtually the equivalent of an acquittal—in these circumstances retrial is unlikely and ultimate conviction even more so. On the other hand, where the jury is divided 10-2 in favor of conviction, the practical difference to the defendant between a unanimity rule and a rule of 10 may be very great.

[31]

> It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

In re Winship, supra, 397 U.S. at 364.

> The chief point in favor of the rule [of unanimity], however, is that, on the average, its application is bound to bring a greater degree of general satisfaction and public contentment . . . Courts are constituted not only to determine individual cases, but, by furnishing an organized means of adjustment, to maintain the tranquility of society; and it seems plain that the average litigant, or accused defendant . . . when he knows that twelve of his fellow men have united in its decision, will accept the verdict with much better grace than one reached by a split jury, as also will the community at large. This, probably more than any other reason accounts for the origin and long continuance of the unanimity rule.

von Moschzisker, *Trial by Jury* 299-300 (1930).

Society's confidence in the integrity of the criminal process should not be compromised in favor of the marginal convenience of permitting non-unanimous verdicts.

3. *The Unanimity Requirement Guarantees Meaningful Representation of a Cross-Section of a Community.*

There is a long line of decisions in this Court securing the principle that a criminal jury must be drawn from a jury panel that reflects a true cross-section of the community. *E.g., Whitus v. Georgia,* 385 U.S. 545 (1967); *Smith v. Texas,* 311 U.S. 128 (1940); *Norris v. Alabama,* 294 U.S. 587 (1935); *Strauder v. West Virginia,* 100 U.S. 303 (1880).

The cross-section requirement serves several purposes in criminal jury trials. The variety of perspectives it produces on the jury helps to ensure the soundest possible evaluation of the credibility of witnesses and assessment of guilt. It guarantees the accused that his guilt will not be determined by a group from which his peers have been systematically

excluded. It legitimates, in the eyes of all parts of society, the imposition of criminal sanctions.[32]

Jury unanimity is a necessary procondition to the effective application of the cross-section requirement. While members of racial, religious or ethnic minorities, women, poor people, young people or other previously excluded groups may now be represented on juries, a rule permitting a less than unanimous verdict makes it possible for a verdict to be rendered without their acquiescence and indeed without the consideration of their views. Only where a verdict cannot be rendered over the objection of any juror does the cross-section requirement assure a broad community consensus for the imposition of criminal sanctions, and thereby assure that the jury will perform its constitutional function as a check on official oppression. See *Duncan v.*

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[32]Kuhn, *Jury Discrimination: The Next Phase*, 41 S. Cal. L. Rev. 235, 241-247 (1968); Tucker, *Racial Discrimination in Jury Selection in Virginia*, 52 Va. L. Rev. 736, 742-745 (1966); Kalven and Zeisel, *The American Jury, supra*, 210-213; Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 Hastings L. J. 1417-20 (1969); Note, *Community Hostility and the Right to an Impartial Jury*, 60 Colum. L. Rev. 349, 349-50 (1960).

Sir Matthew Hale said of trial by jury:

> . . . It has the unanimous Suffrage and Opinion of Twelve Men, which carries in itself a much greater Weight and Preponderation to discover the Truth of a Fact than any other Trial whatsoever.

The History of the Common Law of England (1713) at 263.

Cf. Witherspoon v. Illinois, 391 U.S. 510, 519-520 (1968). In stressing the importance of including persons of varying viewpoints on a jury, so that it may "express the conscience of the community," *id.* at 519, the Court observed:

> [O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 . . . .

Id. at 519, n. 15.

Louisiana, supra, 391 U.S. at 155, 158; *Williams v. Florida, supra,* 399 U.S. at 100.

B. There is a Broad National Acceptance of the Unanimity Requirement in Criminal Jury Trials.

In federal courts and in the courts of 46 states, unanimity is secured in the trial of all criminal cases to which the federal jury trial right applies. In two other states, Montana and Oklahoma, less than unanimous verdicts are permitted for a handful of crimes punishable by up to one year in prison.[33] Only in Oregon and Louisiana can less than unanimous jury verdicts be rendered in the trial of offenses punishable by over a year's imprisonment.[34] Even

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[33] Montana permits a verdict of two-thirds of the jury in misdemeanor cases. The jury may consist of any number less than twelve in any case involving less than a capital offense, upon the agreement of the parties and the consent of the court. In the justice or police court, the jury consists of six at most, and less if the parties agree to a smaller number of jurors. Although misdemeanors are ordinarily punishable by no more than six months' imprisonment, there are exceptions for a few offenses. MONT. CONST., art. 3, § 23; MONT. REV. CODES ANN. §§ 94-116, 95-1901(c), 95-1915(a), 95-2005, 95-2006(a).

Oklahoma permits a verdict by three-fourths of the jury in misdemeanor cases. A misdemeanor jury is composed of six persons. Misdemeanors are generally punishable by imprisonment of up to one year. OKLA. CONST., art. 2, § 19 (1970-71 Supp.); OKLA. STAT. ANN., tit. 21, § 10.

[34] Oregon permits a majority verdict by ten out of twelve jurors in all felony cases except first degree murder, although it requires unanimity in first degree murder trials and all petty and misdemeanor cases tried in district court. ORE. CONST., art. 1, § 11; ORE. REV. STAT. 136.610.

Louisiana permits a majority verdict by nine out of twelve jurors in all non-capital cases where punishment is necessarily at hard labor, although it requires a unanimous verdict by a jury of twelve in capital cases, and by a jury of five where punishment may be at hard labor. LA. CONST., art. 7, § 41; CODE OF CRIM. PROC., art. 782.

The failure of both states to provide for unanimity in trials involving non-capital serious felonies, while requiring it for all lesser and

in these two states, unanimity is required in capital cases, thus indicating a legislative recognition that, at least where life is at stake, the imposition of penalties is improper without the greater security of a unanimous verdict.[35]

In *In re Winship*, which involved the standard of guilt beyond a reasonable doubt in criminal cases, this Court indicated the constitutional significance of widespread adherence to a traditional rule of criminal procedure:

> Although virtually unanimous adherence to the reasonable doubt standard in common law jurisdictions may not conclusively establish it as a requirement of due process, such requirement does "reflect a profound judgment about the way in which the law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

397 U.S. at 361-362.

Similar considerations strongly support the recognition of jury unanimity as a Sixth Amendment requirement.[36]

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greater offenses, raises a serious question whether the distinctions are arbitrary and capricious, and hence deny equal protection of the laws to those convicted by non-unanimous juries. See generally *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[35] The fact that over half the states now allow civil verdicts by less than unanimous juries, see Note, *On Instructing Deadlocked Juries*, 78 Yale L. J. 100, 127 n. 2 (1968), while 48 states require unanimity for felony convictions, further illustrates broad recognition of the importance of this additional safeguard against error in criminal cases.

[36] Petitioners' argument in this case is framed in terms of the Sixth Amendment. It is plain, however, that many of the considerations discussed herein, including the relationship of jury unanimity to the reasonable doubt standard and to jury cross-section requirements, are equally relevant to the interpretation of the due process and equal protection clauses of the Fourteenth Amendment, unassisted by the Sixth Amendment. Thus, even if the holding in *Duncan* that the Fourteenth Amendment applies the Sixth Amendment jury trial right to state criminal proceedings is not accepted, see *Williams v. Florida*, *supra*, 397 U.S. at 117 (Harlan, J., concurring), 143 (Stewart, J., concurring), there is nonetheless a strong basis in the general language of the Fourteenth Amendment for the requirement of unanimity in criminal jury trials.

C. The Legislative History of the Sixth Amendment Supports the Conclusion That Congress Intended to Incorporate the Right to a Unanimous Verdict in the Guarantee of Jury Trial.

In *Williams*, the Court held that the legislative history of the Sixth Amendment failed to indicate whether or not the framers intended to incorporate the requirement of 12 jurors. 399 U.S. at 92-99. There is additional evidence with respect to the unanimity requirement which strongly indicates an intention of the framers of the Bill of Rights to incorporate that guarantee in the Sixth Amendment.

North Carolina refused to join the Union until certain specified individual rights, including the right to unanimous jury verdicts in criminal trials[37], had been guaranteed by the Congress.[38] The interrelationship between the passage of a

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[37]North Carolina's proposed Declaration of Rights stated in part:

> 8th. That, in all criminal and capital prosecutions, a man hath a right . . . to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty . . . .

4 J. Elliot, *Debates In the Several State Conventions on the Adoption of the Federal Constitution, and Journal of the Federal Convention* (2nd ed., 1836) (hereinafter cited as Elliot's *Debates*) at 243. The provision in Virginia's proposed Bill of Rights was identical. 3 Elliot's *Debates* at 658, § *.

[38]The North Carolina Convention stated in a resolution adopted August 2, 1788, that "this Convention has thought proper neither to ratify nor reject the Constitution proposed for the government of the United States," despite the Convention's recognition that, the necessary number of states having ratified the Constitution, the Federal Government would begin its operations without them. 4 Elliot's *Debates* at 251.

On the same day, the Convention adopted a Declaration of Rights, *id.*, which included the unanimity provision, *supra*, n. 37, and was prefaced by the following statement:

> Resolved, That a declaration of rights, asserting and securing from encroachment the great principles of civil and religious liberty . . . ought to be laid before Congress, and the convention of the states that shall or may be called for the

Bill of Rights and the willingness of some colonies to join the Union was emphasized in the debate on the Bill of Rights in the First Congress.[39] James Madison stated the purpose of the Bill of Rights was to quiet the fears of those who thought that the Constitution had not adequately safeguarded various rights, including the right to trial by jury.[40] Representative Gerry stated in debate that the objections of North Carolina and Rhode Island would have to be met before they came into the Union.

> Are gentlemen willing then to throw Rhode Island and North Carolina into the situation of foreign nations? They have told you that they cannot accede to the Union, unless certain amendments are made to the Constitution; if you deny a compliance with their request in that particular, you refuse an accommodation to bring about that desirable event, and leave them detached from the Union.[41]

Since the chief purpose of the Bill of Rights was to quiet fears that individual rights were insufficiently protected, it follows that North Carolina's expressed apprehension concerning the elimination of unanimity in jury verdicts was intended to be alleviated by the Sixth Amendment.[42] Only

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> purpose of amending the said Constitution, previous to the ratification of the Constitution aforesaid on the part of the state of North Carolina.

Id. at 242.

[39]North Carolina had transmitted the above resolutions and Declaration of Rights to Congress and to each State. 4 Elliot's *Debates* at 252.

[40]1 *Annals of Congress* 746 (1834).

[41]1 *Annals* 445. There is evidence that some of the States which ratified the Constitution had done so because of assurances that the same types of safeguards sought by North Carolina would be provided. Compare Virginia's proposed bill of rights, *supra* note 37, with the statement of Rep. Gerry, 1 *Annals* at 447.

[42]The Ninth Amendment to the United States Constitution, which provides that "the incorporation in the Constitution of certain rights shall not be construed to deny or disparage others retained by the

after the adoption of the Bill of Rights by the Congress did North Carolina join the Union.[43] In contrast to this concern that jury unanimity be guaranteed, the number of jurors does not seem to have troubled any of the states during the ratification process.

D. Practical Considerations Favor the Retention of the Unanimity Requirement.

In contrast to the near uniform nationwide practice with respect to jury unanimity[44], at least twelve states provide for juries of less than twelve in the trial of criminal cases[45] to which the federal jury trial right applies. Thus, unlike the situation in *Williams*, retention of the common law standard would affect only a small handful of jurisdictions. Moreover, even within those few jurisdictions the transition from a non-unanimous to a unanimous rule can be simply carried out. No change need be made in the numbers of jurors available for duty or actually impaneled, or in the size of jury boxes or other facilities. Only the judge's instruction to the jury would have to be changed.

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people" certainly prohibits the inference that the mere lack of specification of the unanimity requirement in the Sixth Amendment suggests it was not guaranteed. The Ninth Amendment was introduced specifically to preclude inferences of this kind that might otherwise be drawn from the skeletal form of the Bill of Rights. 1 *Annals* at 439; 1 *Annals* at 442; see also *The Federalist Papers*, No. 83; Remarks of C. C. Pinckney in the South Carolina House of Representatives on the Ratification of the Constitution, 3 M. Farrand, *Records of the Federal Convention of 1787* (1911) at 256; Remarks of James Wilson in the Pennsylvania Convention, 3 Farrand's *Records* at 143.

[43] 2 *Annals* at 1714.

[44] See Section B, *supra.*

[45] The authorities are collected in an Appendix to Justice Harlan's concurring opinion in *Williams*, 399 U.S. at 139-141, and in Appendix B to the Brief for the Appellant in *Duncan v. Louisiana, supra.*

While the unanimity requirement will cause greater length of deliberation in many criminal cases—a phenomenon that petitioners believe provides an important consideration in favor of its retention—the jury will be deadlocked only in an additional two or three per cent of criminal cases.

A fixed requirement of twelve jurors would have permanently and inflexibly imposed on state criminal systems a burdensome and expensive procedure that the Court in *Williams* found was without substantial purpose in terms of the historic role of the jury. Unanimity serves important functions and the practice of 48 states demonstrates that its retention would impose on substantial additional burdens on the administration of criminal justice.

Another practical consideration supports the retention of the unanimity requirement. In Louisiana, nine out of twelve jurors can return a verdict in serious criminal cases.[46] In Montana, two-thirds of the jury can return a verdict in a class of cases to which the Sixth Amendment right to a jury trial applies.[47] Approval of a verdict supported by ten of twelve jurors will raise the questions of whether these lesser majorities—or even a verdict returned by a simple majority of jurors—comports with the essential requirement of trial by jury. Further difficulties will arise when majority verdicts are combined with the juries of less than twelve members approved last Term.[48] Given *Williams*, a decision permitting less than unanimous verdicts may soon confront the Court with a myriad of different combinations of jury size and required majority, raising difficult line-drawing problems. Until those problems are resolved, such a deci-

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[46] See note 33, *supra.*

[47] See note 34, *supra.*

[48] Oklahoma, for example; permits jury verdicts by 3/4 of a six-man jury in some cases punishable by up to one year in prison. See note 33, *supra.*

sion will create serious uncertainty in the administration of the criminal law.

VIII. CONCLUSIONS

The requirement of unanimity in criminal jury verdicts is grounded in several hundred years of practice in this country and at common law. It has been long recognized by this Court as a constitutionally guaranteed feature of the Sixth Amendment right to trial by jury in criminal cases. It has always been considered to bear a strong relationship to the purposes of the jury system. There are no compelling circumstances which might justify the abandonment of this basic guarantee.

Petitioners respectfully urge their convictions be reversed or remanded for a new trial in accordance with the unanimity requirements of the Sixth Amendment.

Respectfully submitted,

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